STATE OF MICHIGAN

IN THE SUPREME COURT

LEONARD ZELANKO,

Plaintiff-Appellee,

vs.

BOARD OF COUNTY ROAD COMMISSIONERS FOR THE COUNTY OF WASHTENAW and RICHARD LEE SHEHAN, Jointly and Severally,

Defendants-Appellants.

Supreme Court No. _____

Previous Supreme Court No. 120913-14

Court of Appeals No. 220532
Consolidated with Case No. 219761

Washtenaw County Circuit Court
Case No. 98-9848-CZ

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BRIEF IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

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INDEX OF AUTHORITIES

CASES

STATUTES

RULES

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COUNTER-STATEMENT OF QUESTION PRESENTED

DOES DEFENDANT'S ACT OF RUNNING A MOTOR VEHICLE OVER AND/OR FAILING TO AVOID A LARGE PIECE OF RECAP TIRE, PROPELLING THAT PIECE OF DEBRIS INTO THE VEHICLE BEING OPERATED BY PLAINTIFF AND RESULTING IN PLAINTIFF'S INJURIES, FALL WITHIN THE "MOTOR VEHICLE" EXCEPTION TO GOVERNMENTAL IMMUNITY, ESPECIALLY GIVEN THAT: (1) DEFENDANT HAS FAILED TO PRESERVE FOR APPEAL THE ISSUE WHETHER THE TRACTOR WITH ATTACHED MOWER IS A "MOTOR VEHICLE" WITHIN THE MEANING OF MCLA 691.1405; AND IT IS SUCH A VEHICLE IN ANY EVENT; AND (2) PLAINTIFF'S CLAIM IS CONSISTENT WITH AND ALLOWED BY THE SUPREME COURT'S DECISION IN CHANDLER v MUSKEGON COUNTY, 467 MICH 315 (2002)?

Plaintiffs answer, "**YES**".

The Court of Appeals and the Circuit Court answer, "**YES**".

Defendant answers, "**NO**".

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COUNTER-STATEMENT OF FACTS

On September 12, 1996, a tractor with an attached lawn mower, owned by the Defendant Washtenaw County Board of Road Commissioners and operated by Richard Shehan, ran over a piece of recap tire, causing it to be thrown in the air "directly at the 1994 Freightliner truck [Plaintiff] was operating" on eastbound I-94 (S.D. Resp. Exh. C, Zelanko Affidavit, ¶ 3).[1] "The recap tire struck and shattered the windshield of the truck." Id. In his Complaint, Mr. Zelanko alleges that Shehan negligently operated Defendant's vehicle, causing Mr. Zelanko's injuries.

"Just prior to the accident," Plaintiff had "noticed and observed the tractor with the attached lawnmower cutting the grass off to the right shoulder of I-94." Id., ¶ 4. "There were certain sections of the back of the mower that looked open and appeared to be without safety guards." Id. Mr. Zelanko noticed "some chains or other devices hanging which appeared to be safety guards," but "some were missing." Id.

"The tractor with the attached lawnmower also was traveling at an angle, partly in a ditch, with the mower angled in such a way that it was aimed out toward traffic on I-94." Id., ¶ 5. "There was alot of debris on or around that section of I-94 at the time, both on and off to the side of the road in the grass." Id., ¶ 7. "It was an accident waiting to happen." Id., ¶ 6.

The piece of recap tire that struck the hood of Mr. Zelanko's truck and shattered his windshield "was at least three feet in length," and "made a large skid mark on the hood" of the Freightliner semi-truck. Id., ¶ 8.[2]

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[1] All exhibit references are to the exhibits to Plaintiff's S.D. Response (filed: 6/2/99), unless otherwise identified.

[2] Mr. Zelanko receives medical care in Canada, but has been unable to resume working as a truck driver for any extended time, as he continues to suffer from the effects of the accident, including severe post-traumatic stress disorder.

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Debris being thrown into traffic by Road Commission vehicles is a significant and commonplace occurrence on Washtenaw County highways. It is Road Commission policy that if the driver observes debris in front of the lawnmower, the driver is supposed to stop the tractor and move the debris out of the way (S.D. Resp. Exh. A, Shehan dep, p. 27; S.D. Resp. Exh. B, Engelbert dep, p. 25). "It is often easy to see debris like recap tires because they do not lie flat on the road or in the grass, but rather, are often curved, stick up and are easily visible" (S.D. Resp. Exh. C, Zelanko Affidavit, ¶ 7). Defendants have produced several accident reports which contain documentation of incidents in which Washtenaw County-owned lawnmowers have thrown rocks, pieces of metal, wood and other debris into traffic causing damage to vehicles. Mr. Shehan, the driver in this particular incident, and his supervisor, Mr. Engelbert, have admitted this sort of incident occurs several times per year (S.D. Resp. Exh. A, 19-20-22; Exh. B, 21-22).

Mr. Shehan claimed at deposition that he is unsure if his mower drove over the piece of recap tire which was thrown into Mr. Zelanko's truck. Engelbert testified, nevertheless, that Shehan told him that is exactly what occurred (S.D. Resp. Exh. B, 14). Shehan stated that although he is usually unaware that the lawnmower has thrown debris into traffic until he is pulled over by an individual whose car is hit, he drives over debris every day (S.D. Resp. Exh. A, 19-20, 35-36). Shehan admitted that at times he knowingly drives over debris, and that such debris may or may not be thrown into the air by the mower. Id., 35-36.

Plaintiff does not allege that Defendant's employee, Shehan was negligent in cutting grass, but in operating the motor vehicle so as to run over and/or fail to avoid the large shred of recap tire, thereby jettisoning it directly toward Mr. Zelanko's truck, where it shattered his windshield, and resulted in his post-accident disability (Complaint; 7/22/99; ¶¶ 7-11).

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The Court of Appeals affirmed the Circuit Court's denial of Defendant Commission's Motion for Summary Disposition. *Sub nom*: Regan v Washtenaw County Road Commissioners, 249 Mich App 153 (2002) (Defendant's Application, Exh. B). The Court of Appeals concluded that Mr. Zelanko (and the plaintiff in the consolidated case, Ms. Regan) had alleged injuries resulting from the negligent operation of a motor vehicle within the meaning of MCLA 691.1405, supra. Regan, 249 Mich App 153, 161-163. The Court concluded: "Whether the operation of the motor vehicles was negligent and resulted in plaintiffs' injuries is for the trier of fact to decide." 249 Mich App 153, 163.

On February 28, 2003, this Court remanded to the Court of Appeals "for reconsideration in light of Stanton v City of Battle Creek, 466 Mich 611 (2002), and Chandler v Muskegon County, 467 Mich 315 (2002)" (Supreme Court No. 120913-14; 2/28/03). This Court did not retain jurisdiction. Id.

On remand, the Court of Appeals again affirmed the trial court's denial of Defendant's Motion for Summary Disposition, concluding that the tractor with attached mower is a "motor vehicle" within the meaning of MCLA 691.1405, as this Court construed that term in Stanton, supra; and that "the motor vehicles were in operation and being driven when the incidents giving rise to the lawsuits occurred, and that the manner of operation was the allegedly causative factor resulting in the injuries" alleged (Defendant's Exh. D; Court of Appeals Opinion on Remand [6/10/03], at pp. 4-6). The maintenance activity undertaken by the tractor mower "cannot be separated from the operation of" the vehicle, "i.e., the maintenance is directed associated with the driving of" that vehicle, the Court concluded. Id., p. 7.

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ARGUMENT

A. STANDARD OF REVIEW

Defendant sought summary disposition under MCR 2.116(C)(7) (immunity) and (10) (no genuine issue of material fact). In either instance, this Court's review is de novo. Rose v National Auction Group, 466 Mich 453, 461 (2002); Smith v YMCA, 216 Mich App 552, 554 (1996). Where the parties have presented documentary proofs, the Court must consider them in a light most favorable to the non-moving party. Patterson v Kleiman, 447 Mich 429 (1994); Rose, supra.

In this case, the Circuit Court and the Court of Appeals (the latter court twice) have correctly concluded that summary disposition is inappropriate, because the available documentary proofs place the case within the "motor vehicle" exception to governmental immunity, MCLA 691.1405. The operation of the mowing tractor, including the jettisoning of the recap tire/debris directly toward Plaintiff's vehicle, where it had an immediate impact upon him, resulting in his injury, falls within MCLA 691.1405, supra. Defendant's argument to the contrary is based upon a misreading of the statute and the case law cited in this Court's remand order.

Plaintiff hereby incorporates the Court of Appeals' decisions in this matter, including the Court of Appeals' published Opinion on Remand (Defendant's Exh. D), but also, respectfully, urges the Court to consider the following discussion.

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B. DEFENDANT'S ACT OF RUNNING A MOTOR VEHICLE OVER AND/OR FAILING TO AVOID A LARGE PIECE OF RECAP TIRE, THEREBY PROPELLING THAT PIECE OF DEBRIS TOWARD THE TRUCK PLAINTIFF WAS OPERATING RESULTING IN HIS INJURY, FALLS WITHIN THE MOTOR VEHICLE EXCEPTION TO GOVERNMENTAL IMMUNITY

1. Defendant Has Failed To Preserve For Appeal The Issue Whether The Tractor With Attached Mower Is A "Motor Vehicle" Within The Meaning Of MCLA 691.1405; It Is Such A Vehicle In Any Event

Defendant-Appellant, the Board of County Road Commissioners for Washtenaw County, never argued, in either the Circuit Court or Court of Appeals, that the tractor with attached lawnmower, the negligent operation of which gives rise to Mr. Zelanko's claim, is not a "motor vehicle" within the meaning of MCLA 691.1405. Issues neither decided by nor presented to the trial court "are not preserved for appeal." Swickard v Wayne County Medical Examiner, 438 Mich 536, 562 (1991); Coughlin v Dean, 174 Mich App 346, 356 (1989) ("This Court generally declines to consider an issue raised for the first time on appeal.").

Nevertheless, this Court, by order of remand, directed the Court of Appeals to reconsider the case "in light of Stanton v City of Battle Creek, 466 Mich 611 (2002)" (Supreme Court's 2/28/03 Order; No. 120914). In Stanton, the Court held that a forklift is not a "motor vehicle" within the meaning of the motor vehicle exception to governmental immunity, MCLA 691.1405.

A similar circumstance occurred in Burns v City of Detroit (on remand), where this Court remanded for consideration whether the Plaintiff's sexual harassment in employment claim was barred by the First Amendment to the Constitution, even though the Defendant had never raised that notion, at any point in the proceedings. See, Burns v City of Detroit (on remand), 253 Mich App 608, 613-614 (2002). The Court of Appeals rejected the First Amendment defense to the sexual harassment complaint, both on the merits and because "no defendant should get the

benefit of this review because no defendant raised the issue of a possible constitutional violation below." Burns, 253 Mich App 608, 614. The Court quoted from this Court's decision in Booth Newspapers v University of Michigan Regents, 444 Mich 211, 234 (1993) for the basic proposition that "[i]ssues raised for the first time on appeal are not ordinarily subject to review." Burns, 253 Mich App 608, 614. Thus, invoking the constitutional issue "to benefit a party who fails to raise the issue would be entirely inappropriate." Id., 616.

This Court should withhold review of an issue which Defendant has never raised. The parties have always briefed this matter on the assumption that the tractor with attached lawnmower is a "motor vehicle" within the meaning of MCLA 691.1405.

Plaintiff's claim is absolutely consistent with Stanton, supra, anyway. In Stanton, this Court concluded that a forklift is not a "motor vehicle" because it does not match the dictionary definition of a "motor vehicle" as "an automobile, truck, or similar motor-driven conveyance," but rather, "is a piece of industrial construction equipment ..." Stanton, 466 Mich 611, 617-618. This Court also noted that a forklift does not meet analogous legislative provisions concerning "motor vehicles", as it is expressly excluded from the statutory definition of "motor vehicle" contained in the Motor Vehicle Code and the No-Fault Act. Stanton, 466 Mich 611, 617, fns. 9-10.

In contrast, the tractor with attached lawnmower is a "motor vehicle", even by the narrow definition selected by this Court in Stanton, supra. It is a "motor-driven conveyance" which is certainly similar to an "automobile" or a "truck", with "rubber tires for use on highways." Stanton, 466 Mich 611, 617, incl. fn. 9. Clearly, this tractor with attached lawnmower reached its place of operation by way of the highway itself, and thus, is capable of and is employed for

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travel on the highways, at least to that extent. It is in no way comparable to the off-road industrial equipment (the forklift) at issue in Stanton, supra.

Furthermore, the statutory definition even of a "farm tractor" reflects a legislative determination that such a tractor is a "motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry." MCLA 257.16 (emphasis added). The tractor/lawnmower unit at issue is "self-propelled", is not "industrial equipment", and is unlike the front-end loader or other "construction equipment" not subject to registration under the Motor Vehicle Code, as provided in MCLA 257.33, supra.

The Michigan courts have continuously held that tractors are motor vehicles, for analogous purposes. Pioneer Insurance v Allstate Insurance, 417 Mich 590, 593-596 (1983); Harder v Harder, 176 Mich App 589, 591-592 (1989).

Accordingly, any belated reliance by the defense upon a "Stanton" argument, in addition to being utterly unpreserved for this Court's review, is completely lacking in merit.

2. Plaintiff's Claim Is Consistent With And Allowed By Chandler v Muskegon County, 467 Mich 315 (2002)

In the Court of Appeals' original, published decision, the Court concluded that Mr. Zelanko has a case under MCLA 691.1405, supra, because he has alleged, and has documentary proofs indicating, injuries resulting from the negligent operation of a governmental vehicle. 249 Mich App 153, 161-163. Accordingly, "whether the operation of the motor vehicles was negligent and resulted in Plaintiffs' injuries is for the trier of fact to decide," the Court held. Id., 163.

This Court remanded for reconsideration in light of Chandler v Muskegon County, 467 Mich 315, 316 (2002).

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Plaintiff respectfully submits that Chandler does not require reversal but rather, is to be distinguished, based on its peculiar facts, which show an injury not resulting from the operation of the motor vehicle, in contrast to the present case.

In Chandler, the plaintiff's co-employee was stuck in a set of bus doors which closed on his neck. The plaintiff was injured when he attempted to pry open the doors and hold them until someone came to the rescue. 467 Mich 315, 316. The bus was not even moving. Id.

Unsurprisingly, on this peculiar set of facts, this Court concluded that the Plaintiff's injury did not result from the "operation" of the vehicle within the meaning of MCLA 691.1405, supra, the motor vehicle exception to governmental immunity. This Court went to the dictionary to define "operation" as "an act or instance, process, or manner of functioning or operating." 467 Mich at 320. The Court further concluded that "operation of a motor vehicle" means "that the motor vehicle is being operated as a motor vehicle." Id. (emphasis in original). Because Mr. Chandler's injury did not result from the use of the bus as a motor vehicle, but rather, while the vehicle "was parked in a maintenance facility for the purpose of maintenance and was not at the time being operated as a motor vehicle," the plaintiff had no claim. 467 Mich at 322.

Compare the present case. Defendant's employee, Mr. Shehan, ran over and/or failed to avoid the recap tire shred, propelling it directly and immediately into Plaintiff's, Mr. Zelanko's, truck. It was the negligent operation of the tractor/lawnmower as a motor vehicle, in the course of its use as a moving, four-wheeled, transportational device, which created the immediate, actual hazard resulting in the injury. It was Mr. Shehan's driving of the vehicle over the debris (the three-foot long shred of tire) which caused Plaintiff's injuries. Defendant's propulsion of the recapped tire shred toward Plaintiff's vehicle was not merely a residual effect, or a phenomenon relating to the vehicle as a mere object, but instead, was the direct result of

Defendant's operation of the tractor. This vehicle's "operation" was more than contemporaneous with, but indeed, was part-and-parcel of the accident, and its immediate and direct cause, in terms of both place and time.

In Chandler, this Supreme Court showed no sign of departing from the basic notion that County Road Commissions "are liable for the negligent operation of their motor vehicles even though liability is incurred in connection with the construction, improvement, or maintenance" of the highway. Bakun v Sanilac County Road Commission, 419 Mich 202, 203, 208 (1984) (emphasis added).

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RELIEF

For the reasons stated in this Brief, Plaintiff-Appellee, Leonard Zelanko, respectfully asks this Honorable Court to deny leave to appeal.

Respectfully submitted,

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